Supreme Court, U.S.
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No. 99-792

IN THE
Supreme Court of the United States

NVR HOMES, INC.,

Petitioner,

v.

CLERK OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that the Eleventh Amendment barred the federal bankruptcy court in this case from issuing declaratory relief that would require the States of Maryland and Pennsylvania to refund real property transfer and recordation taxes?

2. Did the court properly interpret the tax exemption under 11 U.S.C. 1146(c) as applying only to those instruments of transfer made or delivered after confirmation of a reorganization plan and that are necessary to consummation of the plan?

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STATEMENT OF THE CASE

This case was triggered by the refusal of the States of Maryland and Pennsylvania to refund to petitioner NVR Homes, Inc. ("NVR") certain transfer and recordation taxes that were paid in connection with transfers of real property made by NVR's predecessors when they were debtors in bankruptcy. While the States of Virginia, New York, Delaware, and North Carolina refunded to NVR the taxes that those States had previously collected, taxing authorities in Maryland and Pennsylvania refused to do so because they disputed NVR's contention that the transfers were non-taxable under 11 U.S.C. § 1146(c). (App. 44a.) That section provides that "the making or delivery of an instrument of transfer under a plan [of reorganization] confirmed under § 1129 . . . may not be taxed under any law imposing a stamp tax or similar tax."

Claiming that its transfers were exempt from taxation because they were made under a plan of reorganization confirmed by the bankruptcy court two years before, NVR initiated a contested matter by filing a motion in the United States Bankruptcy Court for the Eastern District of Virginia under Rule 9014 of the Federal Rules of Bankruptcy Procedure. That motion sought a declaration that § 1146(c) exempted from taxation the real property transfers that NVR made from the time it filed for bankruptcy until the time its reorganization plan was confirmed.

The bankruptcy court initially granted NVR's motion for declaratory judgment (App. 100a), but subsequently amended its judgment to provide that while § 1146(c) exempted the transfers from local taxes, the Eleventh Amendment prohibited the judgment from binding Maryland or Pennsylvania as collectors of state transfer taxes. (App. 99a.) After finding that there was a justiciable controversy because the state and local taxing authorities in Maryland and Pennsylvania had refused or failed to refund previously paid recording taxes (App. 101a), the court stated that (1) NVR's request for declaratory relief "addressed no threat of any future violation" (App. 78a), and so (2) NVR's "only purpose in seeking relief of a 'declaratory' nature,

then, must have been to obtain an order which could act as res judicata in some later proceeding to actually recover the monies." (App. 78-79a). The bankruptcy court held that the Eleventh Amendment barred NVR's action seeking a declaratory judgment to be used in state court proceedings to obtain tax refunds because the effect of such a judgment was the same as an award of damages or restitution. (App. 79a.)

The court also held that the real property transfers were exempt from local taxes under 11 U.S.C. § 1146(c). Adopting the findings of fact and conclusions of law submitted by NVR (App. 100a n.1), the court found that while "[t]he *sine qua non* of the Confirmed Plan was a $160 million public offering of ten-year Notes" (App. 115a), the success of the public offering was predicated upon NVR's "ability to remain in business in the ordinary course during the Chapter 11 period." (*Id.*) Based on these findings, the court concluded that the transfers "were exempt from transfer and recordation taxes" (App. 102a) because "the transfers were dealt with, necessary and essential to the Confirmed Plan." (App.115a.)

On appeal, the district court held that the relief sought by NVR's motion was not barred by the Eleventh Amendment and that the transfers at issue were exempt from taxation under § 1146(c). (App. 53a.) Finding that this proceeding was not a "suit" for Eleventh Amendment purposes, the district court stated that "NVR's motion requested that the bankruptcy court, pursuant to its retained jurisdiction over the plan, enter an order clarifying the intended coverage of the Plan's exemption provision." (App. 51a.) The court held that the Eleventh Amendment "was no obstacle to the bankruptcy court's power to declare . . . certain real property transfers exempt from taxation under § 1146(c) and the Plan." (App. 52a.) The district court declined to decide, however, whether the bankruptcy court's declaratory judgment "is binding in any way" on Maryland or Pennsylvania. (App. 53a.). The court also held that the transfers at issue were tax-exempt because they

"enabled NVR to remain a viable operation and avoid liquidation." (App. 49a.)

The court of appeals reversed the district court's decision on the Eleventh Amendment immunity issue and vacated its decision on the tax exemption as applied to the State taxing authorities.[1] (App. 30a.) The court rejected the district court's determination that NVR did not seek any money from the States but rather sought only "a federal interpretation of § 1146(c)," stating if that were so it would render the court's decision "advisory and beyond a federal court's Article III power." (App. 22a.) Finding that NVR was not seeking an advisory decision, the court stated that "the substance of NVR's motion demands affirmative action by Maryland and Pennsylvania" in the form of a tax refund "payment from the Maryland and Pennsylvania treasuries." (App. 20a.) Citing this Court's decisions in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48-49 (1994), and *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945), the court held that such relief was barred because "an action leading to an order forcing a payment to citizens is the quintessential 'suit' under the Eleventh Amendment." (App. 21a.)

On the tax exemption issue as it affected local taxing authorities, the court of appeals reversed the district court judgment to the extent it held that § 1146(c) applies to transfers occurring prior to the confirmation of NVR's reorganization plan, but affirmed the district court's judgment to the extent it covers transfers occurring after the plan was confirmed. (App. 30a.) The court of appeals subsequently denied NVR's Petition for Rehearing and Suggestion for Rehearing en banc and respondents' Petition for Rehearing.

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[1] The court of appeals considered the State taxing authorities to be the Maryland circuit court clerks as collectors of state taxes and the Department of Revenue of the Commonwealth of Pennsylvania. (App. 7a.)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ELEVENTH AMENDMENT DECISIONS OF THIS COURT AND OTHER COURTS.

Further review of this case is unwarranted because the first issue raised in the petition was not argued in either the court of appeals or the district court, and the remaining questions have been resolved in a manner that conforms with prior decisions of this Court and similar decisions of other federal courts.

Contrary to NVR's assertion that "[t]his case provides the Court with an opportunity to resolve the constitutional validity of 11 U.S.C. § 106(a)," Pet. at 12, that issue has not been preserved for review. While the bankruptcy court held that the abrogation of immunity set forth in § 106(a) was unconstitutional, NVR did not challenge that holding in the district court or the court of appeals. NVR offers no reason why this Court should depart from its usual rule of not deciding "questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citations omitted) (brackets in original). *See also Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

Nor is review warranted to address the Eleventh Amendment issue that the court of appeals did decide because the court applied well-settled principles in determining that the Eleventh Amendment bars the relief that NVR seeks. Relying on *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945), and *In re State of New York*, 256 U.S. 490, 500 (1921), the court of appeals stated that it must "consider both the procedural posture and substantive nature of the proceeding" (App. 14a) in determining the applicability of the Eleventh Amendment in this case. The court committed no error worthy of this

Court's review in examining "the essential nature and effect of the proceeding," *Ford Motor Co.*, 323 U.S. at 464, and concluding this is a classic case in which the Eleventh Amendment applies because NVR "sought a determination that the states owed NVR money – repayment of exempt transfer and recordation taxes – and a favorable decision would require that a federal court raid Maryland's and Pennsylvania's treasuries." (App. 22a.)

While NVR contends that it merely sought "a declaration from the bankruptcy court about the meaning and scope of the Joint Plan, its order of confirmation, and the federal bankruptcy statute," Pet. at 21, the court of appeals agreed with respondents that, if this was truly all that NVR requested, such a declaration "would be advisory and improper" because "the federal court action could not result in ordering the states to return the tax payments." (App. 19a-20a.) Despite its denials, NVR seeks an order requiring Maryland and Pennsylvania to provide tax refunds. Indeed, in concluding that NVR's motion is in essence an action seeking the recovery of money paid to those States, which is a remedy that this Court has held time and again is barred by the Eleventh Amendment, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. at 463-64, the court of appeals determined that, "absent the ability of the bankruptcy court to exercise jurisdiction over the states and compel the turnover of the tax payments, no remedy effectively could be granted." (App. 20a.)

This determination gives rise to no exceptional question of law. Rather, it is entirely consistent with this Court's observation that if a party "would make no claim that the federal declaratory judgment was res judicata in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason." *Green v. Mansour*, 474 U.S. 64, 73 n.2 (1985). Anticipating this language, NVR asserts that "a state court would be required to treat the bankruptcy court's declaration

as the final word on the meaning of the Joint Plan." Pet. at 21. But as the court of appeals found, even if the bankruptcy court's "decision would act only as res judicata in a later state court or state administrative proceeding, then the issuance of the judgment would still be improper." (App. 22a n.5.) Addressing a similar request for declaratory relief, this Court in *Green v. Mansour* stated that a declaratory judgment "would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." 474 U.S. at 73. Even that type of relief would be inappropriate, however, because "the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." *Id.*

The court of appeals' decision is thus completely in accord with these statements, as it is with decisions of other federal courts. While NVR claims that a number of courts have reached "conflicting results" (Pet. at 15) on the Eleventh Amendment issue raised here, NVR does not cite a single bankruptcy case in which a court has held that the Eleventh Amendment is inapplicable to an order that would require a State to refund taxes or other monies. All of the cases that have addressed this issue have held to the contrary. *See, e.g., Bakst v. New Jersey* (*In re Ross*), 234 B.R. 199, 203 (Bankr. S.D. Fla. 1999) ("[I]f this Court were to determine the extent of the Debtors' or the estate's tax liability, it effectively would be entering a money judgment against New Jersey, thus violating the Eleventh Amendment."); *Mitchell v. California Franchise Tax Board* (*In re Mitchell*), 222 B.R. 877, 885 (B.A.P. 9th Cir. 1998) ("Declaratory relief could result in an order having res judicata effect in a later proceeding to recover damages."). *See also United States v. Nebraska* (*In re Doiel*), 228 B.R.

439, 441 n.1 (D.S.D. 1998).

While NVR distinguishes these cases because they are adversary proceedings, Pet. at 15-16 and n.12, the court of appeals in this case correctly recognized that the immunity issue is the same whether it arises in such a proceeding or, as here, in a proceeding initiated by a Rule 9014 motion. That rule explicitly refers to the focus of such a proceeding as a "contested matter" and requires that "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." The court of appeals found that such a contested matter "is unlike an administrative matter in bankruptcy because 'there are (at least) two parties who are opposing each other with respect to relief sought by one of them.'" (App. 19a) (quoting 10 *Collier on Bankruptcy* ¶ 9014.01 (Lawrence P. King ed., 15th ed. 1999)). Fundamental immunity principles are triggered when the resolution of such a dispute results in the type of affirmative relief against a State that NVR seeks in this case.

Rather than cite any authority to support the rather remarkable proposition that the States are not immune in these circumstances, NVR instead relies on cases involving altogether different issues, such as whether the Eleventh Amendment prohibits a bankruptcy court from (1) determining the dischargeability of debts owed a State, *see Virginia v. Collins* (*In re Collins*), 173 F.3d 924 (4th Cir.), *pet. for cert. filed*, 68 U.S.L.W. 3153 (U.S. Aug. 31, 1999) (No. 99-380); *Texas v. Walker*, 142 F.3d 813 (5th Cir.1998), *cert. denied*, 119 S.Ct. 865 (1999); *Phelps v. Sallie Mae Loan Service Center* (*In re Phelps*), 237 B.R. 527 (Bankr. D.R.I. 1999), (2) adjudicating a proof of claim filed by a State against a debtor, *see In re Barrett Refining Corp.*, 221 B.R. 795 (Bankr. W.D.Okla. 1998), (3) deciding a debtor's liability to pay taxes, as opposed to a State's liability to refund taxes, when the debtor "in no way sought the entry of a money judgment against the State," *Smith v. Psychiatric Hospitals of Fla., Inc.* (*In re Psychiatric Hospitals of Fla., Inc.*), 216 B.R. 660, 661 (M.D.Fla. 1998),

or (4) adjudicating the tax-exempt status of real property transfers in an action brought by a State to collect unpaid transfer taxes from a trust created in bankruptcy. *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir.1997). None of these cases involves any attempt to secure a federal court order requiring a State to pay funds out its treasury to a debtor or another party.

While Maryland and Pennsylvania joined an amicus brief urging this Court to review the decision in *Virginia v. Collins*, No. 99-380, the Eleventh Amendment issue in that case arises, as NVR acknowledges, in a "different procedural setting." Pet. at 17. The question addressed in *Collins* is whether the court of appeals erred in holding that the Eleventh Amendment does not prohibit a bankruptcy court from determining the dischargeability of a debt owed to a State. No need for further review exists in this case, however, because both this Court and the lower federal courts have uniformly held that, subject to exceptions that are inapplicable here, the Eleventh Amendment bars any effort to recover money from the States.

II. THE DECISION BELOW IS CONSISTENT WITH SECTION 1146(c) AND DECISIONS OF OTHER COURTS OF APPEALS.

The petition also raises no substantial question concerning the applicability of the § 1146(c) exemption because the court of appeals correctly interpreted that exemption and did so in a manner that is consistent with the one circuit court decision as to which NVR claims a conflict. Relying on this Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), the court of appeals noted that tax exemptions are to be narrowly construed in favor of the States (App. 28a), and applied the plain meaning rule set forth in *Perrin v. United States*, 444 U.S. 37, 42 (1979), to conclude that a transfer cannot be "under a plan confirmed" if the transfer pre-dates confirmation of the plan. (App. 28a-29a.) While the concurring judge disagreed with the majority's analysis

under the plain meaning rule, he agreed with its conclusion by relying on the rule for strict construction of tax exemptions, and finding that Congress has not clearly expressed an intention to have the exemption apply to transfers made during the pre-confirmation period. (App. 32a.)

Contrary to NVR's assertion, the decision below does not conflict with *City of New York v. Jacoby-Bender, Inc.* (*In re Jacoby-Bender, Inc.*), 758 F.2d 840 (2nd Cir.1985). As the bankruptcy court in that case stated, the transfer in dispute occurred after confirmation of the plan. *See In re Jacoby-Bender, Inc.*, 40 B.R. 10, 11-12 (E.D.N.Y. 1984). The issue there involved the sale of property and delivery of a deed that were authorized by a separate order of the bankruptcy court, but were not specifically authorized in the confirmed plan. The Second Circuit found the absence of specific authorization in the plan to be irrelevant. In holding that the delivery of the deed was "'under' the plan within the meaning of section 1146(c)," the court found the determinative factor to be that "'the plan's consummation depended almost entirely upon the sale of the building,' the sale in turn depending upon the delivery of the deed." 758 F.2d at 841.

Rather than reject the court's views in *Jacoby-Bender*, the court of appeals below expressly stated that it did "not take issue with the Second Circuit's logic . . . ." (App. 25a.) The court simply pointed out that *Jacoby-Bender* does not address the issue that the court of appeals in this case resolved. As the court aptly noted, unlike this case, "*Jacoby-Bender* did not deal with a preconfirmation transfer, but a postconfirmation transfer that, although not *specifically* authorized by the plan, was clearly necessary to the confirmed plan's *consummation*." (App. 25a) (emphases in original). "The succinct issue presented was thus whether the confirmed reorganization plan encompassed the property sale, thereby making it part of a 'plan confirmed' under § 1146(c)." (*Id.*) In contrast, the court below observed that "[t]he relatively straightforward issue before us is . . .

whether preconfirmation transfers are 'under a plan confirmed.'" (App. 28a.) Stating that § 1146(c) exempts only transfers made under a "plan confirmed," the court of appeals found "fundamentally flawed" the proposition that "every transfer 'essential' to a plan's *confirmation* is by definition 'under a plan confirmed'. . . ." (App. 27a) (emphasis in original). Applying dictionary definitions of the word "under," the court stated that it "cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer – a plan confirmed by the court." (App. 29a.) The court of appeals thus concluded that "Congress, by its plain language, intended to provide exemptions only to those transfers reviewed and confirmed by the court." (App. 30a.)

The court's interpretation of § 1146(c) is consistent with the language of the statute and does not generate the circuit court conflict that NVR claims to exist. Indeed, while NVR's purchases and sales of real property may have been essential to its continued viability as a homebuilding business and its ability to formulate and obtain confirmation of its reorganization plan, these transactions did not involve instruments of transfer necessary to execute or consummate the plan. Although NVR asserts that these transfers, both before and after confirmation, were "in accordance with" the plan, the only plan provision it points to as support for this assertion is the provision incorporating the § 1146(c) exemption. *See* Pet. at 28. NVR cites no provision of the confirmed plan in which these transfers are either specifically referenced or implicitly included in a general outline of the activities that are to occur to consummate the plan. The court of appeals committed no error, therefore, in reaching the conclusion that it did.

In sum, the petition fails to identify any issue on which the lower federal courts require this Court's guidance. The petition should be denied, therefore, because this case presents no question warranting the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, the petition should be denied.

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